Supreme Court, U. S.
FILED
FEB 9 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

72-1103

No. A-698

JEAN ORSINI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Jean Orsini, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 11, 1972.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix to this brief. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 11, 1972. On January 3, 1973 an order was granted by Mr. Justice Marshall extending the time to file the petition for certiorari to and including February 9, 1973. This petition was filed within that period. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254 (1).

Questions Presented

1. Did the denial of disclosure or production of the government informer deprive the petitioner of a fair trial, where the petitioner was thereby denied information relevant to the defense of entrapment?

2. Did the failure of the prosecutor to keep an agreement wtih defense counsel deprive the petitioner of a fair trial?

3. Should there have been a hearing to determine whether a search warrant for petitioner's hotel room was tainted by a previous unlawful non-electronic eavesdropping of the room?

4. Was a false exculpatory statement given by the petitioner to the United States Attorney before arraignment, but 39 hours after arrest, admitted into evidence in violation of *McNabb-Mallory*? Is 18 U.S.C. Section 3501 constitutional insofar as it sanctions a departure from the *McNabb-Mallory* cases.

Statement of the Case

Indictment number 72 Cr. 1105 charged the petitioner Orsini, along with Luis Ortega and George Perez, and Etienne Charles Gunther and Raymonde Lejeune Gunther with conspiracy to import, distribute and possess with intent to distribute the controlled substance heroin, and with a substantive count of distribution and possession with intent to distribute heroin in violation of Title 21 United States Code, Sections 812, 841, 952, 957 and 960. The petitioner was tried in the United States District Court for the Southern District of New York before Hon. LAWRENCE W. PIERCE and a jury. On March 7, 1972 Orsini, Ortega and Perez were convicted on both counts.* On April 14, 1972 the petitioner and his co-defendants each received terms of 15 years in prison on count 1, and 10 years on count 2, the sentences to run consecutively.

Statement of Facts

The Government charged that the petitioner participated in a conspiracy which smuggled 93 kilograms of heroin into the United States from France. The heroin was packed into the framework of a Jaguar automobile which was shipped from England to New York aboard the Queen Elizabeth II.

The events which culminated in the arrests of Orsini, Ortega and Perez on September 19, 1971 began a short time

* Co-defendant Etienne Gunther pleaded guilty on December 14, 1971, and testified for the Government at the petitioner's trial. His wife, Raymonde Gunther, was not tried.

before in Europe. In England, an informer for the United States Bureau of Narcotics and Dangerous Drugs, code named "Festus" (R. 511), purchased the Jaguar which was to be loaded with the heroin. Festus was accompanied by a BNDD agent when he bought the car, and the car was registered in the informant's name on August 3, 1971 (R. 927). As anticipated, the Jaguar was later loaded with drugs. It was then sent to the United States on the Queen Elizabeth II, the ship arriving in New York on September 15, 1971. The informer Festus, along with a BNDD agent and a United States Customs agent, accompanied the car to New York (R. 927). Agents in the United States, naturally, were alerted to expect the Jaguar and its contents, and, accordingly, arranged to search it and surveil its movements after arrival.

Meanwhile in mid-August, Etienne Gunther, a native of France and a resident of Paris, met several times with his former brother-in-law, Etienne Mosca near Marseilles. Mosca asked him if he was interested in an all expense paid trip to New York, and then offered him 25,000 francs to bring back money from an "American industrialist" in the United States. Mosca later instructed Gunther that the money was to be brought back in the false bottoms of suitcases, and demonstrated to Gunther how to fashion the valises to conceal the money. Mosca further explained that Gunther would meet two people in the United States. The first man, about 35 years old with blonde hair, he would meet on September 16 from 12 to 12:30 p.m. or 6 to 6:30 p.m. in front of Madison Square Garden Bowling Alley #8. Each would carry a folded newspaper and a key ring in the form of a pen as identification. At the meeting the man would give Gunther a garage parking ticket. Gun-

ther was instructed to give the parking ticket to a second man, who he would meet the next day in the lobby of the Hotel Abbey Victoria, where both would carry unfolded newspapers and key rings in the shape of a flashlight. Gunther was told to call himself Thomas at this meeting, and then arrange a second meeting at which time the man would give Gunther the money. Gunther would then return to France with the money on Sunday, September 18, where Mosca would meet him (R. 54-71). Gunther was also told to take his wife along with him, and the night before he left, Mosca gave him the key rings, money for expenses, and suitcases with materials inside for preparing the false bottom (R. 75-6). Gunther admitted that Mosca told him he was dealing in heroin before he left France (R. 116-17), though he later often lied to the American police about his degree of knowledge (R. 165-6, 171-83, 235-6), and, indeed, even after he admitted knowledge when pleading guilty (R. 181), he still lied about it later in letters rogatory for the French authorities in the presence of BNDD agents who knew his admissions (R. 947-50, 954). Gunther also maintained that his wife had no idea that he was dealing in heroin, although even after Gunther exonerated his wife to the American authorities, she remained charged as a co-defendant and held on $250,000 bail (R. 126-32, 155, 230-1).

On September 14, 1971 Gunther and his wife arrived in New York by airplane, and each registered at different hotels (R. 79-80, 83).

On September 15 the Queen Elizabeth II, with the drug-laden Jaguar, the government informer and two government agents accompanying the informer and the car,

sailed into New York harbor. Customs agents boarded the vessel under the Verazzano Bridge, while still en route to the dock, and after speaking with the agents on board (R. 326-7), located the Jaguar. It was seen that the floor boards had been tampered with, and a quick search of the interior of the fender revealed several bags of white powder. One was taken out, and the fender was replaced (R. 260-70). When the ship docked, the Jaguar was driven off the pier and into the country by the government informer, Festus (R. 276, 296). Agents of the BNDD, according to plan, closely surveilled the Jaguar. Festus first drove it to the Hotel Pierre, and that evening went to the Playboy Club with a girl, parking the Jaguar in a garage across the street, under the General Motors Building (R. 332-3). The agents then entered the garage, and dismantled the car, finding 93 kilograms of heroin in 179 one-half kilo bags. One one-half kilogram bag of heroin was left inside, 178 bags of milk sugar and quinine were substituted for the heroin, and the Jaguar was reassembled (R. 375-6, 496-504, 934). The next day, September 16, Festus twice took the Jaguar to the Madison Square Garden Garage, and then to the Hotel Pierre. On September 17, he once again drove the Jaguar to the Madison Square Garden Garage and then left it there (R. 334-5).

Meanwhile, on September 16 Gunther went to the Madison Square Garden Bowling Alley during the arranged times, but did not make contact. On the 17th, however, Gunther returned and met Festus, who was carrying a folded newspaper and a key chain shaped like a pen. Festus gave Gunther a parking ticket (R. 84-6, 336, 506, 512-15, 524-6). Gunther then went to the Hotel Abbey Victoria

for the expected meeting with the second man. However, no one appeared. The nex day Gunther returned to the Abbey Victoria, and, when leaving, was approached by the petitioner Orsini who called him Thomas and said he recognized him (R. 86-7, 95-6). Gunther gave Orsini the parking ticket and asked for the money. Orsini said, however, that he could not do anything about the money until Monday or Tuesday, and asked how Gunther expected to take back the money. Gunther mentioned suitcases, and Orsini replied that he understood, he had done it several times on previous trips to the United States (R. 97-100).

Surveillance of Orsini on September 18 traced him to the Alrae Hotel, Room 6-J, where he had checked in on September 17, under the name of Huguen (R. 392, 564-7, 941-2). On September 18, after Orsini met with Gunther, he was followed to 587 Riverside Drive, Ortega's address, although Orsini did not meet with anyone there (R. 529, 558, 594-5). At about 5 p.m. on the 18th the doorman of the Alrae Hotel was attempting to get a cab to take Orsini to New Jersey. A BNDD agent, posing as a cab driver, obliged, and took the petitioner to an address in West New York, New Jersey. The agent attempted conversation, but since Orsini spoke bad broken English, and the agent spoke no French the discussion did not prove too enlightening. Nevertheless the agent thought that Orsini mentioned he had been in the United States once before (R. 337-42). Later that night Orsini was seen leaving the Alrae Hotel in the company of Ortega and Perez in a car registered in the name of Rivera. The car was found three days later, abandoned in Hackensack (R. 532, 559-60).

About midnight on September 19 Ortega presented the ticket for the Jaguar to the attendant at the Madison Square Garden Garage. The attendants had trouble starting the car, and after using jump cables, were finally able to get it out of the garage. Perez came into the garage and spoke to Ortega while the car was being fixed (R. 612-21). At 1:15 a.m. the Jaguar was finally able to move, and it was driven down West 31st Street by Ortega. Perez and Orsini followed in a Chevrolet. However, when the Jaguar reached 8th Avenue it stalled. The three defendants tried alternatively to fix it, looking under the hood, and trying to figure out what was wrong. During the one-half hour on the street, various BNDD agents, posing as passers-by, also tried desperately to help start the car. However, no one was successful, and finally the agents closed in and arrested Orsini, Ortega and Perez (R. 569-70, 598-9, 760-5, 768-9, 776-84).

When Orsini was searched at BNDD command post in the Hotel New Yorker, he was found to have a passport with his picture, but the name of Jean Claude Huguen, as well as a document with a map of a car, and instructions on how to dismantle it (R. 557, 798-9, 802, 807-8, 815; Exhs. 25-8). Orsini also was interviewed in French by an agent at 2 a.m. and gave his name as Huguen (R. 685-7). He was kept in detention the whole of Sunday, September 19, and brought to the United States Attorney's Office the next day. He was interviewed there at 1:50 p.m., prior to arraignment and 36 hours after arrest, and gave a false exculpatory statement to the prosecutor, Orsini saying he was Huguen, that he did not meet with anyone on September 18th, and that he was never at the Hotel Abbey Victoria. Orsini

was arraigned later, at 4:30 p.m. (R. 828-32, 835-6, 842-6, Exh. 34).

On September 19 search warrants were executed in Orsini's room at the Hotel Alrae, and at the apartment alleged to be Ortega's in the name of Rivera in North Bergen, New Jersey. In Orsini's room the police found an airline ticket, $1,500.00 in cash, and a key chain in the shape of a flashlight or sparkplug. In the Rivera apartment a scale was uncovered (R. 344-6).

Reasons for Granting the Writ

I. The denial of defense motions for disclosure or production of the government informer deprived the petitioner Orsini of a fair trial and due process, since he was thereby denied information relevant and helpful to the defense of entrapment and essential to a fair determination of the cause.

During the course of the proceedings, it became rather evident that the government informer, code-named Festus, played a highly significant role in the conspiracy to import and distribute the heroin. Far from being simply a narrator of activities carried out by others, Festus was personally involved in a vital and central part of the plan, and was accompanied by BNDD agents when he made his major contributions to the conspiracy. Thus, Festus purchased the Jaguar in England in the presence of a BNDD agent, and the car was registered in the informer's name (R. 927). Clearly, the interest of the federal agent in the buying of the car was in anticipation of the role the car would eventually play in ferrying the narcotics to New

York. After the vehicle was fully loaded with its illicit merchandise, Festus then placed it aboard the Queen Elizabeth II and accompanied the car to the United States, while two federal agents also boarded the ship in Southampton to escort Festus and the car (R. 927). Upon arrival in New York, the informer drove the Jaguar off the pier (R. 276, 296) and, in cooperation with the agents operating in the United States, allowed surveillance of his movements, and then deposited the Jaguar in a garage to permit a thorough search of its interior during the early morning hours after arrival. Festus then met the contact from France, Etienne Gunther, and transferred the garage parking ticket to him. Festus was thereafter listed as a co-defendant in the complaint (R. 486-7).

Throughout the trial, the defense vigorously and persistently pressed for some form of disclosure or production of the informer. The requests were based on two grounds. First, Orsini alleged, as an offer of proof through counsel, that his trip to the United States was triggered by a meeting with a man who fit the general description available of the informer. The man with whom Orsini met in France arranged for the petitioner to come to America without informing him that his activities would involve heroin. The defense thus suggested that Orsini was entrapped by the man he met into participating in the scheme (R. 398, 210-12, 288). Since Orsini could not be positive that the man he met was actually the informer, and, obviously, could not take the stand to testify that he was lured by someone who might not be a government agent, the defense requested simply that the informer be produced only for visual confrontation, so that Orsini could just see him (R. 400).

The second ground urged for disclosure and production of the informer was suggested entirely by the Government's proof. For under recent federal cases, the defense of entrapment has been broadened beyond the typical inquiry concerned solely with the intent and predisposition of the defendant to commit the crime. Entrapment may also exist where the crime itself is generated by the creative activity of the Government where the police conduct falls below standards which due process requires, notwithstanding that the defendant is a willing participant. In other words, a defendant may be entrapped where the government induces him to commit a crime he had no intention of committing. He may also be entrapped where, having the predisposition to commit the crime, the government produces one for him.

The Government, however, vigorously resisted any form of disclosure or production, simply alleging that there was no entrapment. The court, recognizing that the informant, as the Government admitted, was "a vital link in this criminal process, at more than one point in fact" (R. 399), sought to resolve the issue of whether the informant need be disclosed or produced by examining the prosecutor's file in camera with the Assistant United States Attorney, but in the absence of defense counsel (R. 396-414). After the in camera inspection, the court denied the motions for disclosure and production (R. 415-16). The denial of the defense motions was, however, erroneous in the context of this case. For the petitioner was thereby deprived of any opportunity to establish viable defenses to the indictment in circumstances, moreover, where the disclosure and production of the informant would not prejudice the government's interest in concealment.

I

Roviaro v. *United States,* 353 U.S. 53 (1956), is, of course, the leading case involving disclosure and production of informants at trial. In *Roviaro* the defendant was convicted of receiving, concealing and transporting heroin, after importation. As in the present case, the undercover informer "had taken a material part in bringing about the possession of certain drugs by the accused" and "might be a material witness as to whether the accused knowingly transported the drugs as charged" (353 U.S. at 55, *supra*). The government contended that the privilege against nondisclosure of the informer in aid of protecting the public interest and effective law enforcement defeated the attempt by the defense to discover his identity and interviewed him. The Court disagreed, holding that disclosure takes precedence over the privilege where it "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause" (353 U.S. at 60, *supra*). More particularly, the Court found that since the accused was faced with the burden of explaining or justifying his possession of the heroin, he had a "vital need for access to any material witness" (*id.* at 63). And in language directly applicable to Orsini's allegation that he was entrapped by someone who fit the informer's description and who did not tell him that heroin was involved, the Court stated:

> "Doe (the informer) had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. * * * He was the only witness who might have testified to petitioner's possible lack of knowledge of the package that he 'transported' from the tree to John Doe's car. The desirability of calling John Doe as a witness, or

> at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide." (*id.* at 64).

Surely, once Orsini alleged that he was persuaded by someone, who was apparently the government agent, to participate in the crime, and once he claimed that this man had concealed the true purposes of the trip from him, it was relevant and necessary to a fair determination of the cause that the defense be explored, even if only by producing the informer for viewing to see if he was the same man Orsini met. In addition, there can hardly be a convincing claim in this case that it was necessary to conceal the informer any longer. Obviously, he was already identified to the organizers of the scheme in Europe, since they certainly knew who they had entrusted to buy the Jaguar, who had taken it to New York, who had passed the garage ticket to Gunther. In common police parlance, the informant had been "blown" at the time the motions for disclosure and production were made. Thus, since the testimony of the informant might have been highly relevant to the defense of Orsini, the petitioner was "entitled to his name, to such information as the government may have concerning his whereabouts, and to reasonable cooperation in securing his appearance" (*United States* v. *D'Angiolillo,* 340 F.2d 453 (2d Cir. 1965)). The petitioner received none of these.

II

Even if Orsini never met with the government informer, it was necessary to explore the defense of entrapment which the activities of the informer in creating the crime suggested. For the role of Festus and the government in smuggling the narcotics into the country and supplying

them to the defendants indicates that the official conduct may have surpassed acceptable standards.

At the outset, the various opinions in the leading entrapment cases, *Sorrells* v. *United States,* 287 U.S. 435 (1932) and *Sherman* v. *United States,* 356 U.S. 369 (1958), emphasize two grounds for a claim of entrapment. One theory stresses the classic presence or absence of predisposition by the accused to violate the law, while the other concerns the police conduct alone. Under the latter formulation, the predisposition of the defendant to commit the crime is irrelevant. As stated in the concurrence of Mr. Justice Frankfurter in *Sherman*:

> "The crucial question, not easy to answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or government officers * * *" (356 U.S. at 382, *supra*).

Several recent federal cases crystalize the concept by making it clear that where the creative activity of the government in staging a criminal charade to catch a predisposed defendant occurs, entrapment exists as a matter of law.

A most enlightening discussion is found in *United States* v. *Chisum,* 312 F.S. 1307 (C.D. Cal. 1970). In *Chisum* the defendant, who had apparently heard news coverage concerning the activities of a recently indicted counterfeiter, unsolicitedly arrived at the counterfeiter's home and of-

fered to buy all the bogus bills still available. The counterfeiter contacted the Secret Service and it was arranged that an undercover agent would follow up Chisum's suggestion. The government agent supplied the counterfeit bills, gave them to Chisum, and then had the defendant arrested for receiving counterfeit money with intent to pass the bills as genuine. The court held that the indictment must be dismissed "for the reason that the acts of the government agent in delivering and supplying the counterfeit bills constitute entrapment as a matter of law" (312 F.S. at 1309).

> "Were the courts to sanction the law enforcement activities committed in this case, it would transform the laws designed to promote the general welfare into a technique aimed at manufacturing disobedience in order to punish, a concept thoroughly repugnant to constitutional principles. When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it. To permit the government to do so would be to countenance violations of justice" (312 F.S. at 1312, *supra*).

Recently, *Chisum* was cited with approval by the Ninth Circuit in *United States* v. *Russell*, 459 F.2d 671 (9th Cir. 1972), *cert. granted* —— U.S. —— (Oct. 15, 1972). No. 71-1585. In *Russell* the defendants, wishing to produce methamphetamine in violation of law, were supplied by a government agent with an essential chemical which was extremely difficult to obtain without a license. Since there would have been no crime without the government's furnishing of the essential ingredient, the circuit sustained the defense of entrapment because of the "intolerable degree of governmental participation in the criminal enterprise."

Most closely analogous to the present situation is *United States* v. *Bueno,* 447 F.2d 903 (5th Cir. 1971). In *Bueno* the defendant was charged with the importation and sale of heroin. The drug was purchased in Mexico by a paid government informer, smuggled into the United States by the informer, cut and prepared by the informer and the defendant, and then sold. The court found that where the government furnishes the contraband to the prospective seller, entrapment as a matter of law exists.

> "the sales of heroin were made through the creative activity of the government. The defendant would not have had the heroin to sell if it had not been purchased by the informer. In fact, this particular heroin would apparently not have been in the United States at all, if it had not been smuggled in by the informer." (447 F.2d at 906 *supra*).

Similarly, in *People* v. *Scott,* 21 Ill.2d 320, 172 N.E.2d 765 (1961) the high court of Illinois agreed with the reasoning of *Bueno* by finding entrapment as a matter of law where the defendant was convicted of possessing and selling narcotics supplied by a government agent.

> "We cannot condone the action of one acting for the government in supplying the very narcotics that gave rise to the alleged offense. We know of no conviction for sale of narcotics that has been sustained when the narcotics sold were supplied by an agent of the government. This is more than mere inducement. In reality the government is supplying the *sine qua non* of the offense." (172 N.E.2d at 768, *supra*).

In the present case, as in *Bueno,* the government smuggled the narcotics into the United States and supplied it to the defendants. And the government informer was sufficiently implicated to be classified as a co-defendant in the original

complaint in this case. Presumably, this sort of deep governmental involvement would be sufficient to make relevant further exploration into the details of the government's participation in manufacturing the crime. Indeed, in view of *Bueno, Russell* and *Chisum,* the issue of entrapment was a viable one which could not be just buried under the rug without depriving the defendant of a fair determination of his case. The issue simply had to be explored for the trial to be a true test of Orsini's culpability (see, *United States* v. *Lewis,* 447 F.2d 134 (2d Cir. 1971).

Though the government represented that the informer did not participate as fully as did the agents in *Bueno,* and the trial court, upon reviewing the files in camera seemed to agree, these answers are insufficient. In the first place, in camera examination of prosecution files do not assure that all the facets and subtleties of the information contained will be appreciated without defense participation. After all, the adversary system relies on advocacy, not unilateral representations. As stated in *Dennis* v. *United States,* 384 U.S. 855 (1966), with regard to in camera examination of records by the court, it is not "realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities" (384 U.S. at 874-5, *supra*; also see, *Alderman* v. *United States,* 394 U.S. 165, 180-5 (1967), holding that in camera review of surveillance files is insufficient disclosure, since only the defense, and not the judge alone, would safely have the time and familiarity with the information to appreciate all its implications). But even more importantly, examination by the court in camera of the prosecution files can-

not assure that the information contained in the records is accurate. What the informer told the government about his participation is one thing. What he actually did may be another. In *United States* v. *Dillet,* 265 F.S. 980 (S.D. N.Y. 1966), an informer-entrapment case, the court recognized that there, as well as in other cases cited in the opinion, "the informer took advantage of the Government in order to preserve his informer status or earn the fee which is paid for every case made while the informer simultaneously deceived the Government as to his own violations of the law" (265 F.S. at 986, *supra*). Obviously, it is not appropriate, or a sufficient protection, to take the informer's version at face value when the issue concerns his own involvement in crime or his own possible deceptions on the government agents who were employing him.

In sum, then, the resistance to disclosure or reasonable cooperation in producing a "blown" informer here does not comport with the holding of *United States* v. *Jones,* 360 F.2d 92 (2d Cir. 1966), where, in reviewing an attempt to establish an entrapment defense, Chief Judge Friendly, succinctly stated:

> "We do not look with favor on attempts by prosecutors to restrict full examination of the Government's relations with special employees when this is relevant to the question of inducement of the illegal conduct" (360 F.2d at 96, *supra*).

II. The failure of the prosecutor to keep an agreement with defense counsel concerning the evidentiary use of the Orsini-Huguen passport requires a new trial. At the very least a hearing should be held regarding the terms of the agreement.

When the petitioner Orsini was apprehended, the police seized a passport with his picture, but the name of Jean Pierre Andre Huguen. During trial, it was stipulated that the person arrested on September 19 with Ortega and Perez was Jean Orsini, and that the passport he possessed was issued to another person, Huguen (R. 557, Exh. 32). During the prosecutor's summation, the jury was, of course, urged to consider the passport as false identification. However, the prosecutor also made reference to various stamps and visas indicating prior trips to the United States on July 5, 1970 and October 22, 1970, as well as trips to Spain and Argentina (R. 1097-8). The purpose was clearly to corroborate Gunther who told of Orsini's reference to prior trips, as well as to indicate Orsini's involvement with smuggling through his travels. Though it was never established when Orsini obtained Huguen's passport, and thus whether the prior trips were made by Orsini or Huguen, defense counsel objected to the reference to the passport's prior stamps because it violated a specific agreement between prosecution and defense. Counsel for Orsini represented to the court that the stipulation admitting Orsini's possession of another person's passport was made

> "with the express agreement with Mr. Walker (the prosecutor) that the passport would not be used as proof of prior trips whatever, because, your Honor, in the absence of that agreement, I would have attempted

> to prove through the Government's witness that this passport came into the possession of Mr. Orsini just prior to this trip and that, in any event, since a passport was one Huguen's and not Orsini's, there would be no proof of Mr. Orsini's prior trips to this country."
>
> "This was important to me, your Honor, and Mr. Walker in summation—and I don't think deliberately—but nevertheless he violated that specific agreement." (R. 1108).

The prosecutor, when asked to comment, first referred to the exact words of the stipulation admitting Orsini possessed Huguen's passport, and argued that there was no mention in the stipulation when Orsini received the passport or how long he had been using it (R. 1109). When Orsini's counsel, Mr. Fisher, acknowledged that the stipulation did not record the agreement in full, the court asked Mr. Walker about the unwritten agreement to limit the use of the passport's contents. Mr. Walker then replied that "I do not recall stating as to what use I would make of this passport or limiting myself in any way" (R. 1110-11). Mr. Fisher then asked for a hearing, offering to call witnesses to prove that such an agreement had been made, and urged that "if there are agreements between Government counsel and the defendant's counsel, they have got to be lived up to. I was trying to expedite this trial, your Honor, and, quite frankly, this was not in accordance with the agreement. It was an express violation" (R. 1113). Mr. Fisher moved for an instruction to the jury that the visas in the passport are not proof of any prior trips made by Orsini, for a hearing on the terms of the agreement, and for a mistrial, all of which were denied (R. 1113-14). Subsequently, a motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure was made for a hearing and

new trial based upon the prosecutor's violation of the agreement between the parties. In his affidavit, Mr. Fisher expanded on the circumstances of the agreement. Specifically Mr. Fisher recalled that he was told of government witnesses from France who would testify to Orsini's possession of Huguen's passport, and was also informed that these witnesses were anxious to return home. Since counsel intended to establish through these witnesses that Orsini did not make the prior trips recorded in the Huguen passport, it was therefore agreed to stipulate to the fact that the passport was not Orsini's, but that the government would not attempt to use the stamps in the passport to prove prior trips to this country by Orsini (affid. p. 2). The affidavit also recited discussions which occurred about this incident while the jury was deliberating. Mr. Fisher averred that he spoke with Mr. Walker and the United States Attorney's student assistant, Steven Jacobs, who had aided Mr. Walker in the preparation and presentation of the case. Mr. Walker indicated that he would take Mr. Fisher's word for the fact that the agreement existed, and Mr. Jacobs recalled, in Mr. Walker's presence, that the agreement had in fact been made. Trial counsel for Ortega, Mr. Essen, also told Mr. Fisher in a telephone conversation that he recalled the agreement (affid. p. 3). Mr. Fisher offered to call Mr. Walker, Mr. Jacobs, Mr. Essen and himself as witnesses at a hearing to confirm the existence of the agreement.

In his responding affidavit to the Rule 33 motion, Mr. Walker now remembered telling Mr. Fisher at the time the stipulation was entered into that he only intended to use the passport to show Orsini entered the country on Sep-

tember 17 and that he was using a false passport. He further recalled stating to Mr. Fisher that he did not attach any particular significance to the pre-September 17 entries and "did not presently intend to use them to any purpose" (affid. p. 2). However, Mr. Walker said he did not make any agreement to refrain from using the passport references on summation (*ibid.*). The motion for a hearing and a new trial was subsequently denied by the court on the day of sentencing.

If there was an agreement, as Mr. Fisher represented and as a hearing would likely show, the violation of the agreement by the prosecutor requires a new trial. Initially, counsel are frequently encouraged to make every effort to resolve as much as can be agreed upon between the parties prior to trial, so that the trial of a criminal case can proceed as swiftly and efficiently as possible. Obviously, however, a system that encourages agreements between counsel can only work if the agreements are kept. Recently, in a somewhat different context, the Supreme Court examined a broken agreement between prosecution and defense counsel. In *Santobello* v. *New York*, —— U.S. ——, 92 S.Ct. 495 (1971), a prosecutor agreed to accept a plea to a lesser charge with the understanding that he would make no recommendation at sentencing. Upon sentencing however the agreement was broken, inadvertently, by another Assistant District Attorney who had no personal knowledge of the agreement when he recommended a jail sentence of one year. When the agreement was called to the court's attention, the judge stated that he would ignore the recommendation entirely, but then sentenced the defendant to a jail term. The Supreme Court nevertheless vacated the judgment as "another example of an unfortunate lapse in or-

derly prosecutorial procedures". Indeed, the Court did not need to reach the question of whether the sentence recommendation actually influenced the sentencing court. Rather the Court concluded that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made" required relief (92 S.Ct. at 499). Indeed, prosecutorial misconduct in breaking an agreement with defense counsel stands on the same footing as prosecutorial suppression of evidence or deception. It is, in essence, a transgression of basic principles of fair play embodied in the due process clause. Without adherence to these principles, the adversary system is unworkable and unreliable. Here, for instance, the sudden reference in summation to the visa stamps in the passport to indicate prior trips effectively went to the jury without any opportunity of defense counsel to argue, either by cross-examination of witnesses or in his own already concluded summation, that the trips could not be attributed to Orsini. Relying on the word of the prosecutor, the defense was simply and unfairly ambushed on an important aspect of the case. Indeed, Mr. Walker's response in his affidavit to the rule 33 motion hardly commends the propriety of his position. For he admits that he represented to defense counsel that he did not intend to use the visa stamps "to any purpose" (affid. p. 2). By concealing, by not expressing it, a mental reservation that he might use the passport stamps on summation, he effectively perpetrated a deception on the defense, and abused his standing as an officer of the court. Such conduct touches directly on cases such as *Giglio* v. *United States*, —— U.S. ——, 92 S.Ct. 763 (1972); *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Napue* v. *Illinois*, 360 U.S. 264 (1959) and *Bardy* v. *Maryland*, 373

U.S. 83 (1962), since concealments, deceptions and suppressions of evidence which deprived the defense of full opportunity to present its case there is closely paralleled by the deprivation of a defense occasioned by the breaking of an agreement here. Indeed, where surprise and ambush form part of the prosecutorial trial posture, new trials are appropriate to allow defense rebuttal (see, *United States* v. *Kelly*, 420 F.2d 26 (2d Cir. 1969)). Furthermore, while the wrong committed could have been remedied, as defense counsel suggested, by an appropriate instruction to the jury to disregard the prior visa stamps in the passport (R. 1108-9), the prosecutor's denial of any representation or agreement at the time (later specifically and significantly retracted in his affidavit—affid. p. 2), left the court feeling that he was bound by the written stipulation alone (R. 1111). Since the prosecutor compounded the error he made in violating the agreement by failing to acknowledge the discussions he had with counsel, the only appropriate remedy left is a new trial.

While the prosecutor argued in response to the rule 33 motion that the evidence of prior trips was not so important, a prosecutorial breach of duty often goes beyond the materiality of the specific evidence involved. For "when the prosecutor's conduct is considered to have transgressed the basic principles of fair play embodied in the due process clause", such misconduct takes precedence over any harmless error claim (see, *Kyle* v. *United States*, 297 F.2d 507, 513 (2d Cir. 1961)). In any event, here the question of whether Orsini did or did not make prior trips to this country was clearly material and important. To begin with the government's principal witness, Etienne Gunther, testified

to a conversation with Orsini on September 18, 1971, wherein Orsini allegedly stated that he had been to this country for similar purposes before. Mr. Walker's reference to the passport as further proof of the fact that Orsini had been to this country before corroborated the testimony of a witness whose credibility had been seriously and effectively impugned and this corroboration centered upon an issue in clear dispute. Furthermore, the sole defense of the defendant Orsini was the failure of the government to prove directly or indirectly his actual knowledge of his involvement in heroin trafficking. The defense never contested the obvious fact that Orsini was in this country up to no good and that he knew that. But the defense contended Orsini did not know he was involved with heroin. Certainly proof or argument to the effect that Orsini had been here before seriously attacked this trial position. Instead of a man who had come to this country once on an unknowing errand of the master plotter, Etienne Mosca, we have the picture of a narcotic importer frequently plying his trade in this country.

Consequently, the prosecutor's breach of faith centering about an issue of no small importance to the defense requires a new trial. At the very least, a hearing should have been held to substantiate that an agreement was made between prosecution and defense concerning the use of the passport, and that the prosecutor violated the agreement.

III. The petitioner Orsini was improperly denied a hearing on the issue of whether the search warrant for his hotel room was tainted by a previous unlawful non-electronic eavesdropping of the room.

The hearing on the pre-trial motion to suppress included an exploration of probable cause contained in the affidavit for the search warrant for Orsini's hotel room, 6-J at the Alrae Hotel. However, upon trial, and with the exposure of 3500 material, counsel learned for the first time of police surveillance of the interior of the room on September 18, the day before the warrant was issued. Specifically, Exhibit 3504 revealed that agent Yarborough had ensconsed himself in room 6-I of the Alrae Hotel, adjoining Orsini's room, and that through a keyhole or an aperture he had made observations and overheard conversations (R. 321). The defense then moved to have a hearing to ascertain the details of the non-electronic eavesdropping, and, specifically, to inquire into the question of whether anything seen or overhead through an illegal search amounted to a primary taint, which, unattenuated, contributed to procuring the search warrant (R. 321-3). In response, the government recognized that "some argument could be made in this area" and stated that it therefore "does not intend to offer any evidence of Yarborough with respect to anything he saw through an aperture" (R. 322). The court denied a hearing on the grounds that there was sufficient probable cause in the affidavit supporting the warrant, and the factual basis for the warrant did not refer to the observations and overhearing made through the aperture in the adjoining room (R. 323). This conclusion, however,

was incorrect, for the brief hearing required should have been granted.

In contrast to the government's position, the issue is not whether the evidence obtained by Yarborough would be used at trial. Rather, if the search conducted by Yarborough were illegal, the information he obtained might prove related to the allegations establishing probable cause in the warrant, having contributed to discovery by the police of the facts eventually incorporated in the affidavit. In other words, the facts in the warrant or leads to them may have been found by a direct exploitation of the primary taint occasioned by an illegal search (see, *Wong Sun* v. *United States,* 371 U.S. 471 (1963); *Alderman* v. *United States,* 394 U.S. 165 (1968); *United States* v. *Paroutian,* 299 F.2d 486 (2d Cir. 1962)).

Certainly, a person is entitled to reasonable expectations of privacy within his hotel room (*Katz* v. *United States,* 389 U.S. 347 (1967); *United States* v. *Jeffers,* 342 U.S. 48 (1951)). And non-electronic eavesdropping, from corridors or adjoining rooms, can well infringe Fourth Amendment protections (*e.g., United States* v. *Case,* 435 F.2d 766 (7th Cir. 1970)). Whether the eavesdropping here was lawfully conducted is, of course, not specifically known, since a hearing was never held. But, as *Case* points out, reasonable expectations of privacy include the expectation that private discussions will not be overheard by agents lurking in hallways or, obviously, peering through keyholes (435 F.2d at 768). Moreover, since the eavesdropping occurred on the first day the agents learned of Orsini's existence, it is not unlikely that important leads were devel-

oped from what they surreptitiously saw and overheard from the adjoining room. Consequently, since there was good reason to believe the activity of the agent constituted an unlawful search, it was incumbent on the court below to allow a "taint" hearing to determine the specific circumstances of the non-electronic eavesdropping, and to find out the use or exploitation made of the information learned as a result.

IV. The false exculpatory statement given by the petitioner to the United States Attorney during a period of unnecessary delay in arraignment should have been excluded.

The petitioner was arrested at about 1 a.m. on the early morning of Sunday, September 19. He was taken to the BNDD command post at the Hotel New Yorker, where he was searched (R. 798-9), and then, at about 2 a.m., he was questioned in French by Agent Pohl, who took a pedigree statement (R. 685-7). Orsini was lodged in the West Street detention center for the remainder of Sunday. Though a magistrate was available for arraignment at 10 a.m. on Monday, September 20 (R. 835-6), Orsini was not brought to the courthouse until Monday afternoon. Before proceeding before the magistrate, however, the petitioner was taken to be interviewed by the Assistant United States Attorney, ostensibly for the purposes of making another pedigree statement. The interview began at 1:50 p.m., and the petitioner soon gave false exculpatory answers to questions concerning who he was, whether he had met anyone the Saturday before, and whether he had ever been at the Abbey Victoria Hotel (Exh. 34). Orsini was arraigned at 4:30

p.m., 39 hours after the arrest (R. 828-32, 842-6). The trial court found that the petitioner had properly been warned of his rights, and that the statement he made was voluntary (R. 748-51).

Petitioner submits that the statement made during the delay in arraignment period violated the principles of the *McNabb-Mallory* cases for the reasons expressed by Chief Judge Friendly, concurring in *United States* v. *Marrero*, 450 F.2d 373 (2d Cir. 1971). There, in a similar factual setting, the Chief Judge wrote, "I would find that the detour through the Assistant United States Attorney's office when a commissioner was available after this long period was such an 'unnecessary' delay" (*id.* at 379). Though the concurrence went on to find the confession admissible, notwithstanding the delay, under the authority of 18 U.S.C. Section 3501, petitioner submits that Section 3501 is unconstitutional insofar as it sanctions a departure from the holdings of *McNabb* v. *United States*, 318 U.S. 332 (1943) and *Mallory* v. *United States*, 354 U.S. 449 (1957). Petitioner further urges that *United States* v. *Marrero*, *supra*, was wrongly decided, and that the statement should have been suppressed on the authority of 18 U.S.C. 3501 (c), since the period of unnecessary delay was longer than the six hours set in the statute, and was not excused by difficulties mentioned in the statute of transportation or distance.

V. Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, petitioner Orsini hereby adopts by reference the points and arguments raised in the petitions of Ortega and Perez.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
IVAN S. FISHER
Attorneys for Petitioner Orsini

ALAN SCRIBNER
Of Counsel

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 221, 222—September Term, 1972.

(Argued October 13, 1972 Decided December 11, 1972.)

Docket Nos. 72-1479, 72-1482

UNITED STATES OF AMERICA,

Appellee,

—v—

LUIS GOMEZ ORTEGA, GEORGE WARREN PEREZ and JEAN ORSINI,

Defendants-Appellants

Before:

FRIENDLY, *Chief Judge,*
MEDINA and ANDERSON, *Circuit Judges.*

Appeal from judgments of conviction in the United States District Court for the Southern District of New York, Lawrence W. Pierce, *Judge.*

Luis Gomez Ortega, George Warren Perez and Jean Orsini appeal from judgments entered on the verdict of a jury, convicting them of conspiracy to import, distribute and possess with intent to distribute 93½ kilograms of heroin, in violation of 21 U.S.C., Section 846, and with distribution and possession with intent to distribute of one-half kilogram of heroin, in violation of 21 U.S.C., Section 841(b)(1)(A) and 18 U.S.C., Section 2.

Affirmed.

ARTHUR J. VIVIANI, Assistant United States Attorney, New York, N.Y., (Kenneth Feinberg, John M. Walker, Jr., John W. Nields, Jr., Assistant United States Attorneys, and Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N.Y., on the brief), *for Appellee.*

HERALD PRICE FAHRINGER, Buffalo, New York, (Lipsitz, Green, Fahringer, Roll, Schuller and James, Buffalo, New York, on the brief), *for Defendant-Appellant Luis Gomez Ortega.*

NANCY ROSNER, New York, N.Y., (Edmund Allen Rosner and Rosner & Rosner, New York, N.Y., on the brief), *for Defendant-Appellant George Warren Perez.*

IVAN S. FISHER, New York, N.Y., (Albert J. Krieger and Alan Scribner, New York, N.Y., on the brief), *for Defendant-Appellant Jean Orsini.*

MEDINA, *Circuit Judge:*

This is an appeal from judgments, entered upon the verdict of a jury, after a trial before Judge Pierce, by Ortega, Perez and Orsini, each of whom was found guilty on both counts of an indictment charging them with conspiracy to import, distribute and possess with intent to distribute 93½ kilograms of heroin, in violation of 21 U.S. Code, Section 846, and with distribution and possession with intent to distribute a smaller quantity, about a half kilogram, of heroin, in violation of 21 U.S. Code, Section

841(b)(1)(A), and aiding and abetting, in violation of 18 U.S. Code, Section 2. Ortega and Orsini were each given heavy sentences of 10 and 15 years imprisonment on the two counts, to be served consecutively, and fines of $10,000 and $25,000, or an aggregate of $35,000 were imposed on each. Perez was sentenced to 7 years imprisonment on each count, to be served concurrently, and he was fined a total of $7,000. These three appellants are now serving their sentences.

Each appellant claims that the evidence adduced by the prosecution was far short of what was required to establish the commission of the crimes charged. Each of them also asserts that the judgment of his conviction must be reversed for a variety of other reasons which we can more readily describe after stating in chronological order the facts as the jury may have found them to be.

I

The Background and the Development of the Conspiracy

Somewhere in the world there must be persons of enormous wealth and influence who individually or in groups support and manage the gathering of the raw materials, the processing of vast quantities of heroin and the sending of this heroin to the United States. These unknown persons operate in many countries and one of the characteristics of their operations that helps these master minds to avoid detection is that their numerous agents often have no acquaintance with one another until they converge and carry out their secret orders with respect to the distribution of a particular shipment and the receipt and return of the money to those who had planned and supervised the venture. This record does not disclose the over-all operations of this international narcotics ring, nor the identity of those who plan its operations. Nor does the indictment contain

any such charge. But the record does disclose and the indictment charges these particular appellants with the crimes above stated with reference to a particular shipment of a very large quantity of uncut and practically pure heroin, amounting to 93½ kilograms and of a retail value of $1,000,000, according to the evidence. This heroin was hidden in a variety of open spaces in the construction of the chassis of a tan colored Jaguar Sport Car, and these 180 bags of heroin could have been concealed in this automobile only after it had been dismantled by skilled mechanics and then put together again. Of the individuals who converged and met in New York City to carry out their secret orders and to transport and deliver this heroin and receive the money to be paid by the prospective purchasers, one was a Corsican who came from Barcelona, Spain, one came from France and two were Cubans at least temporarily living in New York City or the vicinity. French and Spanish interpreters were in attendance throughout the trial. We do not know who supplied this large quantity of heroin or who paid for it or who secreted the bags in the Jaguar. Nor do we need to know. We do know that upon arrival in New York the Jaguar contained the hidden 180 bags of heroin and we do know that each of these appellants played his several role, working with the others and that they were in possession and control of the Jaguar at the time they were all taken into custody. As we shall see, the evidence of the acts of these three conspirators and their knowledge that heroin was concealed in the Jaguar is overwhelming.

We give this brief description of the background because the man who bought the Jaguar in England and who came with it to New York on the Queen Elizabeth II, and the man who turned it over to those who were waiting here to receive it was a government informer. The principal point raised by appellants is that they claim the trial

judge should have forced the government not only to identify this informer but to describe his whereabouts and to produce him for the alleged purpose of giving appellants an opportunity to put him on the witness stand and support what appellants choose to call their "defense" of entrapment. It was stipulated that the informer purchased the Jaguar in England in the presence of one of the U.S. Narcotics Agents, that is to say that the agent saw him buy it, and that the government did not furnish any money to buy the Jaguar or give any instructions to the informer to buy it. The informer had no contact whatever with any of these appellants and the so-called "defense" of entrapment was not supported by any proof whatever, as none of the appellants testified at the trial. Moreover, with such a large shipment and the total absence of any showing that the government paid for any part of the heroin or had anything whatever to do with hiding the 180 bags of heroin in the Jaguar, we think this wholly unsubstantiated "defense" is absurd. We shall return to this subject later.

The events charged in the indictment commence in August of 1971 when a Frenchman named Etienne Gunther, who lived with his wife and young daughter in Paris, went to Niolon, a small village near Marseilles, and spent the weekend at the villa of Etienne Mosca, who had formerly been the husband of Gunther's sister Georgette. Gunther knew that Mosca was a trafficker in heroin and the upshot of the visit was that Gunther agreed on September 7, 1971 to go to the United States and bring back a large quantity of currency which he was to smuggle into France and deliver to Mosca. The arrangements made between Mosca and Gunther, who pleaded guilty to one of the counts of the indictment and later testified for the government at the trial, give a clear blueprint of what was to take place. And the cunning way in which Ortega, Perez and Orsini covered their tracks and resorted to subterfuges, the use of false

names and a continual shuttling around to avoid detection, form a web of direct and circumstantial proof from which these appellants could find no avenue of escape.

The basic plan was simple. One person, who, unknown to the participants in the conspiracy, turned out to be the government informer, was to bring the Jaguar and its hidden 93½ kilograms of heroin from England to the United States on the Queen Elizabeth II, leaving Southampton September 10, 1971. The schedule was tight. Gunther and his wife were to arrive by plane in New York on September 14; the Queen Elizabeth II docked in New York on September 15. Although the persons involved in the operation did not previously know one another, clandestine means were planned by which the car and its contents could be delivered to one of the conspirators, and by which the conspirator who thus had control of the Jaguar and its contents could make contact with the others who were to distribute this large quantity of heroin and receive the money to be paid for it. The final stage was to be the return of Gunther to France with the money, not later than Monday, September 20th. The conspirators thought they were operating successfully on schedule until Ortega, Perez and Orsini were arrested in the early morning of Sunday, September 19th, as they were attempting to drive off the Jaguar to make the delivery and receive the money. They had made the necessary contacts with one another, they had provided the place where the heroin was to be weighed, packed and delivered, and Gunther had started to build the false bottoms in the suitcases provided by Mosca to hide the large quantity of currency to be smuggled back into France by Gunther.

We may remark, parenthetically, that a combination of customs agents and agents of the Bureau of Narcotics and Dangerous Drugs made an examination of the Jaguar and its contents in the hold of the Elizabeth II as she came up

the harbor, and one of the 180 bags of heroin was removed for testing. Late the next night while the Jaguar was in a garage opposite the Playboy Club, where the informer was disporting himself with a young lady, government mechanics dismantled the Jaguar, removed 178 bags of the heroin and substituted a similar number of bags containing a harmless lactose, and left hidden in the car bag number 179, with its original contents of pure, uncut heroin. A final search of the Jaguar was made after the arrest and this disclosed bag number 179 and its contents just where the government agents had left it. In the meantime, however, Ortega, Perez and Orsini thought the Jaguar, now in their possession and under their control, contained its original load of 180 bags or 93½ kilograms of heroin. Appellants claim that all these searches, or most of them, were made without warrants and without probable cause in violation of their Fourth Amendment rights. Even the searches made in execution of warrants are attacked as made without probable cause and on the basis of insufficient affidavits.

We shall now trace the covert operations of the conspirators. On Friday, September 17, the Jaguar was parked in the New Madison Square Garden public garage by the man who had brought it from England. Gunther had never seen this man but Mosca had shown Gunther a photograph of him. They were to meet at #8 Bowling Alley in the New Madison Square Garden at 12:00 to 12:30 P.M. or 6:00 to 6:30 P.M. and they were to recognize one another by the identification of a folded newspaper and a pen-shaped key ring that each was to carry. They met at the appointed time and place, recognized one another and the parking ticket was delivered to Gunther. At this point the informer steps out of the picture and he has nothing to do with Gunther's making contact with the second unknown, who turned out to be Orsini, who had arrived by plane from Barcelona, Spain one day behind schedule.

The meeting between Gunther and Orsini takes place. This time the recognition signal is that each is to carry an unfolded newspaper and a flashlight-shaped key ring and Gunther was to use the code name Thomas. The parking ticket for the Jaguar is now turned over to Orsini and elaborate arrangements are made for a later meeting at which Orsini was to hand over the money to Gunther to be taken back to France.

In Orsini's possession at the time he received the parking ticket from Gunther were several documents written in French. These were on Orsini's person at the time Ortega, Perez and Orsini were arrested. One of these documents contains a description of how Orsini is to recognize Gunther and the code name "Thomas," another is a diagram of the Jaguar showing the 10 places where the 180 bags of heroin were concealed and still another document containing instructions how to take the Jaguar apart to get out the heroin.

The government agents knew that the Jaguar and its contents had arrived and they had taken the precaution of seizing all but one bag of this very valuable cargo. But they did not know to whom the Jaguar and its supposed contents were to be delivered nor who the other cooperating members of the conspiracy might turn out to be. How these people were located is the story of a very fine piece of detective work. And, as this story unfolds, it becomes clearer at every step that each of these appellants knew they were possessing and distributing an unusually large shipment of heroin and that their guilt of the charges contained in the indictment was established.

So, on Saturday, September 18, the agents followed Orsini from the Hotel Abbey Victoria, where he met Gunther, to the Hotel Alrae where Orsini had registered as a guest, using the false name of Jean Pierre Andre

Huguen.[1] Now that he had in his pocket the parking ticket and instructions how to dismantle the Jaguar and get out the heroin, we might expect him to make a beeline for the people who were to help distribute the heroin and collect the money, and that is precisely what Orsini did, with the usual backing and filling and getting in and out of cabs that indicate an effort to throw any government agents off the scent. So, Orsini started off in a cab and went straight to 587 Riverside Drive, where Ortega was to be found. When a search warrant was executed and the contents of Orsini's room at the Hotel Alrae were seized, there was found a memorandum containing the following:

476 Riverside Drive Apt 1D
New York—N.Y. 10031
1 5 ①—3738

The 1 in a circle is a code indication that the real Riverside Drive address is to be obtained by adding 1 to each of the numbers in 476. Thus Orsini knew that the man he was looking for was at 587. Certain numbers also appear on this memorandum which is on Hotel Alrae notepaper. The inference, of course, is that Orsini brought with him from Barcelona the papers in French giving him instructions how and where to identify Gunther, describing the hiding places of the 180 bags of heroin and how to take the car apart to get them, but the memorandum giving Ortega's address in code was made after some telephoning by Orsini in the interval between his arrival at the Alrae after receiving the parking ticket from Gunther and 3 P.M. when he started to go up to 587 Riverside Drive. He stayed there only a few minutes and then went back to the Alrae. There was no time to lose if he was to effect delivery of the heroin

1 The prosecution found out through the French police that his real name was Jean Orsini.

and have the money representing the purchase price ready to hand to Gunther on Monday, September 20, at the Sports Bar on 51st Street between 8th and 9th Avenues, as agreed between Gunther and Orsini at the time of delivery of the parking ticket. What Orsini was to hand to Gunther at the Sports Bar was the money.

This was a busy time for the conspirators. They must prepare a place to unload the Jaguar, a place to weigh and repack this huge quantity of heroin and get together the pile of bills that Gunther was to hide in the false bottoms of the suitcases given to him by Mosca. Gunther was busy constructing these false bottoms according to detailed instructions from Mosca, but time ran out and he and these three appellants were arrested when their plans miscarried and the Jaguar broke down just as they were on their way to make delivery of the heroin and get the money ready. More of this later.

Orsini left the Alrae again at 4 P.M. on Saturday, September 18. He handed the cab driver, who happened to be a government agent, a slip of paper on which was written the address 1021 Kennedy Boulevard, West New York, New Jersey. In a conversation in part French and part broken English Orsini displayed some knowledge of the part of New Jersey where they went. There was again the usual going in and out of buildings, walking up and down the street and passing some time in a bar. Finally, Orsini returned to the Alrae. He left the Alrae at 10 P.M. with Ortega and they both walked to the corner of 63rd Street and Madison Avenue, where they got in a maroon 1970 Ford station wagon driven by Perez, and all three drove off together.

Between 10:00 P.M. and 12:20 A.M. on Sunday, September 19, Orsini, Ortega and Perez managed to escape the surveillance of the agents. But bits of evidence when put together make it pretty clear that the three were busy

in New Jersey getting ready for delivery of the heroin. The agents had the license number and a description of the Ford station wagon. This was found abandoned in Hackensack, N.J. It was registered in the name of Rafael Rivera who gave his address as 608-82nd Street, North Bergen, N.J., which was not far from West New York and not a great distance from Hackensack. And it turned out that, when searched after his arrest, Perez had in his pocket the keys of the maroon Ford station wagon and a driver's license, a Social Security card, and a Selective Service Draft Certificate, all in the false name of Rafael Rivera. Perez gave the North Bergen residence as his address. It also turned out, as disclosed by the execution of a search warrant on this same September 19, also after the arrest, that 608-82nd Street, North Bergen, N.J. contained a vacant apartment, on the ground floor of a two-family house, with the name Rivera on or near the entrance door, and that hidden under the sink in a closed compartment, covered by newspapers, was a flexible balsam board and a Hanson 25 pound scale appropriate for the weighing and measuring of large quantities of heroin. It also appeared that Ortega at the time of his arrest was carrying a driver's license in the name of Santos Hernandez who was supposed to live at the same address, 608-82nd Street, North Bergen, N.J. So two of these three appellants were tied in together at this vacant dwelling, which seemed to be a perfect choice for the conduct of such an illegal enterprise as the weighing and packaging of 93½ kilograms of heroin for delivery. And the third of these appellants, Orsini, had been seen cruising around the vicinity. It is significant that on September 16, 1971 the New Jersey Division of Motor Vehicles issued the registration of a Chevrolet to the supposed Santos Hernandez, or Ortega. This is the very day the Jaguar was

parked at the New Madison Square Garden Garage. And it is in this same Chevrolet that we find Perez and Orsini escorting Ortega, who was driving the Jaguar, at the time of the arrest, as will appear shortly.

In any event, having made the necessary arrangements for delivery and payment, to their satisfaction, the trio now present themselves at the New Madison Square Garden Garage to pick up the Jaguar and its contents. It is now after midnight. The abandonment of the Ford station wagon in Hackensack is explained by the fact that Perez was now driving the Chevrolet. The trio had switched cars to put any possible followers off the scent. Ortega marched in with the parking ticket; the Jaguar is turned over to him by the garage attendant; but, to the dismay of the conspirators, the Jaguar will not start. The car is coasted down the ramp to the street floor; Perez comes in to help. Finally, the engine is started, with Ortega in the driver's seat. After going a block or two, immediately followed by the Chevrolet, driven by Perez with Orsini beside him, the Jaguar, which the conspirators believe is filled with a million dollars worth of pure, uncut heroin, comes to a final stop at the intersection of 8th Avenue and 31st Street. What happens then is interesting. Each of the trio, Ortega, Perez and Orsini, makes a desperate effort to start the car. They are literally surrounded by government agents who appeared to be bystanders. When one of these, diagnosing the situation as carburetor trouble, takes off the air filter, Perez pushes him away, fearing that perhaps some of the precious heroin might be disclosed if people began taking the car apart. Perez finally got a cab driver to come and help while Orsini and Ortega in the Jaguar were trying to get the engine going. At this point the three appellants were arrested, and a search of their persons, incidental to the

arrest, and a search of the premises at 608-82nd Street, North Bergen, N.J., and of Orsini's room at the Alrae pursuant to search warrants produced the incriminating documents above referred to and other items that we pass over as we think what has already been written shows that there was ample evidence to sustain the findings of guilt on both counts as against each appellant. There is much additional incriminating evidence. At least Ortega and Orsini were old hands at the business. False statements of one kind and another were made. But the essential facts are as above stated.

The testimonial and documentary proofs taken as a whole plainly justified, if they did not, indeed, compel a finding that Perez as well as Orsini and Ortega knew they were trafficking in heroin. The conspiracy and the knowing participation of each of these appellants were established beyond any doubt. There was ample proof that the three conspirators, Perez as well as Ortega and Orsini, were in joint possession and control of the Jaguar, which they thought contained the entire shipment of 180 bags of heroin, but which in fact only contained the ½ kilogram bag of heroin left in the car by the agents at the time they dismantled the Jaguar in the middle of the night at the garage opposite the Playboy Club. Moreover, the proofs were more than ample to establish aiding and abetting by Perez as charged in Count 2. So, we shall not discuss further the claim by each appellant that the evidence was insufficient to support the verdict and the judgments of conviction entered upon this verdict; and we turn to the other rulings that are alleged to call for a reversal of the judgments.

II

There Was no Error in the Series of Rulings concerning the Identification, the Disclosure of the Whereabouts or the Production of the Government Informer

From the beginning of the trial counsel for the defendants tried their best to manufacture some basis for reversal by their demands for the identification, disclosure of the whereabouts of and the production of the government informer who bought the Jaguar, brought it with its contents to New York, turned the Jaguar over to Gunther and then, without having seen or had any contact whatever with any of these appellants, disappeared from the scene of operations.

In their effort to show that the informer's testimony would be "relevant and helpful to the defense" or "essential to a fair determination" of the issues in the case, and thus bring the facts of this particular informer situation within the ruling of the Supreme Court in *Roviaro* v. *United States,* 353 U.S. 53 (1957), the arguments of counsel for these appellants were presented in a double aspect. In the first place, they claimed that the informer, if his identity and whereabouts were disclosed, might be called by them to testify in support of a conventional entrapment defense, or, if interviewed, that he might lead counsel to the discovery of leads that might be helpful in the establishment of such a defense by other proof. But this is not a case where a government undercover agent plays an active part in the carrying out of the transaction that is charged in the indictment against the defendant, as was the case in *Roviaro.* This is no buying or selling of a few $5 glassine bags of diluted heroin in which heroin peddlers and addicts play their parts. This is not a case in which the informer is the only person who could testify to a version of the

single, simple narcotics transaction in such manner as to establish the innocence of the defendant. This is a large undertaking by a ring of international heroin exporters and it involves a million dollar shipment of pure, undiluted heroin. The notion that the government planned and created this venture to entrap the unknown individuals who might ultimately appear in the United States and receive the 93½ kilograms of heroin, weigh and package it for delivery and remit the proceeds to those in charge of the complex international venture is on the very face of the matter quite beyond the stretch of any probability. Moreover, it is clear beyond peradventure of doubt, as demonstrated by what each of these appellants did to effectuate the purposes of the conspiracy, as outlined in our statement of the evidence, that each of these appellants was ready, willing and able and had a prior propensity to engage in a heroin importation and distribution venture. So, we shall say no more of that phase of the entrapment claim.

The more serious phase of the so-called entrapment "defense" was the endeavor to bring this case within the ambit of those decisions that hold that where the government provides not only the occasion for committing the offense but also the contraband necessary for its consummation there is entrapment as a matter of law, irrespective of the propensity of the accused to commit the crime, because this is the only way to prevent such reprehensible and unworthy conduct on the part of the police. Thus in *United States* v. *Chisum*, 312 F.Supp. 1307 (C.D. Cal. 1970), the government informer received the counterfeit bills from the government, gave them to Chisum and then had him arrested for receiving counterfeit money with intent to pass the bills as genuine. In *People* v. *Strong*, 21 Ill.2d 320, 172 N.E.2d 765 (1961), the government supplied the very narcotics that gave rise to the alleged offense.

Without the slightest scintilla of proof, and without any offer of proof, and despite the fanciful nature of the hypothesis in the context of the facts disclosed in this record, counsel for the defendants made repeated statements that the million dollars worth of pure, uncut heroin had been purchased by the government, that the government had caused it to be placed in the Jaguar that had in turn been purchased with government funds, all for purposes of entrapment. It was at first in vain that the prosecutor insisted there could be no such issue in the case without some proof to back up these statements of counsel; that the record was bare of proof that the informant ever saw any heroin, that he ever put any heroin in the Jaguar, or any proof that this extensive international scheme of bringing heroin into the United States originated with either the informer or the government. Finally, as already indicated in our summary of the evidence, a stipulation was entered into between the prosecutor and counsel for all defendants that the government did not furnish any money to buy the Jaguar or give any instructions to the informer to buy it. One might have supposed that this would dispose of the matter. But no, counsel kept repeating their claims that the government had manufactured the crime and that they could prove it if only they could put their hands on the informer and get him into court as a witness. This led to almost interminable argument and discussion. Exercising meticulous care in seeing to it that appellants' rights should not be infringed, the judge listened and listened, and read and analyzed numerous cases cited to him. With this and the numerous suppression hearings during the trial, the members of the jury were sitting in the jury room twiddling their thumbs far more time than they spent in the courtroom listening to the evidence. While such interruptions of a trial are regrettable, the judge's patience had the salutary result of avoidance of error.

The informer issue was brought to a head by an intimation or suggestion by Mr. Fisher, counsel for Orsini, that perhaps progress could be made if, in the words of the trial judge "the government may choose to share with me *in camera* information which has bearing" on the role of the informer and the questions that had been raised by counsel for appellants. This met with general approval by counsel for all defendants, except that Mr. Fisher maintained that in the *in camera* proceeding, in the absence of counsel for appellants, the trial judge should be afforded an opportunity to question the informant. This led to a statement by the prosecutor that he could not produce the informant and that the Second Circuit decisions[2] made it perfectly plain that the government was not under any circumstances required to produce the informant. After everyone seemed to agree on this, the prosecutor said he objected to the *in camera* proceeding but would go ahead with it if the court so ruled, and the prosecutor requested a ruling, which was granted, to the effect that what occurred in the *in camera* proceeding should not be revealed to defense counsel. So, it was ordered that the transcript of the *in camera* proceeding by the court reporter be sealed and only unsealed upon proper showing to the court.

After all these preliminaries, and over the government's objection, the *in camera* proceeding took place, after it had been brought about at appellants' request. The prosecutor

2 The rule in this Circuit was articulated in *United States* v. *D'Angiolillo*, 340 F.2d 453, 455 (2d Cir.), cert. denied 380 U.S. 955 (1965), where this Court wrote: "where the informer's testimony may be relevant to the defense, the defendant is entitled to his name, to such information as the government may have concerning his whereabouts, and to reasonable cooperation in securing his appearance." The government is not required to actually produce the informer. See also, *United States* v. *Roberts*, 388 F.2d 646, 649 (2d Cir. 1968); *United States* v. *Russ*, 362 F.2d 843 (2d Cir. 1966); *United States* v. *Jones*, 360 F.2d 92 (2d Cir. 1966); *United States* v. *Coke*, 339 F.2d 183 (2d Cir. 1964).

with his files of documents went into the trial judge's chambers with the court reporter. After this was over, Judge Pierce returned to the courtroom and said:

> THE COURT: Gentlemen, Mr. Walker has made available to me, in camera, material which causes me to be familiar with the role of the informant in this case.
>
> On the basis of that familiarization, I can find no ground for supporting your requests for either revealing his identity or asking the government's cooperation in producing him here.
>
> I have had in mind, as I reviewed this material, the specific matters which you have called to my attention, your specific concerns, your specific assertions, and I nevertheless find none of these to be supported in any way by the material I have reviewed.
>
> In fact, I find that the situation is quite to the contrary.
>
> On the basis of this in camera proceeding, with the cooperation of the government having made this possible, I rule on your motions at this time and deny them with respect to the informant.

We cannot consider as an objection Mr. Fisher's remark, subsequent to this ruling, that informers are generally unreliable and that one cannot pay much attention to what they say. There were no motions and no further rulings.

The position taken by the prosecutor from the beginning was correct. The record is completely bare of anything to show that the informer could give testimony relevant to or essential to a fair determination of any of the issues in the case. Thus the teaching of *Roviaro* has no application and all of the motions of defense counsel concerning the identification, the disclosure of the whereabouts or the pro-

duction of the informer should have been denied without any *in camera* proceeding.

The references to the trial and in the briefs to *United States* v. *Jones*, 360 F.2d 92 (2d Cir. 1966) and *United States* v. *D'Angiolillo*, 340 F.2d 453 (2d Cir.), cert. denied 380 U.S. 955 (1965), show nothing contrary to what we have above stated. What is meant by "may" or "might" is the same thing as saying that if it does appear in the record that the testimony of the informer is shown by reasonable probability to be relevant or essential to a fair determination of any of the issues in the case, the government's privilege against disclosure is not available.

This we think disposes of the question of identifying, disclosing the whereabouts of and producing the informer.

III

The Trial Judge Properly Refused to Suppress Any of the Objects Found on the Persons of Ortega, Orsini and Perez at the Time of the Arrest or at the Vacant Premises Stated by Perez to be his Home or in Orsini's Room at the Hotel Alrae or the Heroin left in the Jaguar

When one is once familiar with the interrelation of the separate bits of evidence in this complicated case, as sketched in our summary, it is difficult to imagine how there could have been any lack of probable cause for the arrests or any insufficiency in the affidavits upon the basis of which the search warrants were issued or of the proofs of probable cause adduced at the trial.[3] But the pattern of scraps and phrases culled from the mass of dicta and

3 See *United States* v. *Canieso*, Slip Op. Docket No. 72-1789, 2d Cir., November 22, 1972, and cases cited.

wide ranging observations found in the hundreds of court opinions in search and seizure cases gives an appearance of substance to what are mostly frivolous claims. They merit no more than brief discussion.

A

The Jaguar and Its Contents

The search by a Customs Agent and others helping him, in the hold of the Elizabeth II while still in midstream, was clearly proper as a border search. So was the cursory examination on the pier and the removal of a one-half kilogram bag of heroin from the car after the vessel was made fast. Under the circumstances of this case the search without a warrant in the midnight dismantling and reassembling of the Jaguar in the garage opposite the Playboy Club was a mere continuation of the border search. At this time the shipment of heroin was removed and placed in government custody, except for one-half kilogram bag that was left concealed under the driver's seat in such fashion that it could be disclosed and secured only by the use of tools. Surely the government was entitled to make it impossible for this large importation of dangerous drugs to slip through the fingers of its agents by some mischance. And it was equally proper to leave some of the heroin in the car for purposes of proof of the violations of the narcotics laws by those who might be expected to drive off the Jaguar in consummation of their illegal purposes, believing that still hidden in the inner recesses of the framework of the car was the entire 93½ kilograms of heroin.

Appellants make much of the fact that, for some period after the one bag of heroin was left concealed in the car, there was ample time to get a search warrant. They stress the fact that this search was conducted some two hours after Ortega, Orsini and Perez were arrested. There are

several answers to this. We prefer to support the final search at the Headquarters of the Narcotics Squad, after the arrests of appellants, by the ruling of the Supreme Court in *Cooper* v. *California*, 386 U.S. 58 (1967) relative to the search of an automobile that is liable to forfeiture.[4] Here the Jaguar was clearly subject to forfeiture, pursuant to the provisions of 21 U.S.C., Section 881, applicable to the search of vehicles "which are used, or are intended for use, to transport or in any manner facilitate the transportation" of a narcotic drug.

It would seem that the search could also be sustained under the principle of *Chambers* v. *Maroney*, 399 U.S. 42 (1970), applicable to automobiles, when there is probable cause to search the car as distinguished from mere probable cause to arrest the defendants. *Chambers* seemingly supports the proposition that where the police may stop and search an automobile under the doctrine of *Carroll* v. *United States*, 267 U.S. 132 (1925), they may also seize it and conduct the search at a later time.[5]

B

The Search of Orsini's Room 6J at the Hotel Alrae Pursuant to a Warrant

The claim that the affidavit in support of the issuance of the search warrant of Orsini's room was insufficient is frivolous. So is the claim that it was error to refuse to conduct a hearing to ascertain whether the warrant was "tainted" by the alleged unlawful eavesdropping by one of the agents who occupied Room 6I, adjoining Orsini's

4 The continued validity of *Cooper* was reaffirmed by the Supreme Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 482 (1971). See also *United States* v. *Francolino*, 367 F.2d 1013 (2d Cir. 1966), cert. denied 386 U.S. 960 (1967).

5 See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 463 (1971).

Room 6J, who might have heard some conversations through the wall with his naked ear, or might have seen something by peeping through the keyhole of the door between the two rooms. It was discovered that an agent had been in this room when the prosecutor handed over to defense counsel the mass of what is called 3500 material.

Of all the speculations of counsel with which the briefs of the appellants are replete this one is the most farfetched and fanciful. How any information obtained in the adjoining room could be "related to the allegations establishing probable cause in the warrant" is far from clear to us. The almost compelling inference is that there was more than enough probable cause to be found: in Gunther's testimony that he gave the parking ticket to Orsini and arranged to receive the money from him at the Sports Bar the following Monday; the sketch of the places where the heroin was concealed in the framework of the car, the directions concerning how to get the heroin out of the car and the method to be followed in identifying and meeting Gunther, all of which documents were found in Orsini's possession at the time of his arrest; his riding around with Ortega and Perez, and the final joint possession of the Jaguar and its one bag of heroin; all this convinces us that the so-called "taint" hearing was properly denied. It would have been error to rule that any such hearing should be had, under the circumstances of this case.

Besides, there had already been one suppression hearing on the subject of the search of Orsini's room before the trial commenced. The affidavit supporting the warrant, which made no reference to anything observed by the agent in the room next to Orsini's, had been found constitutionally sufficient; and no evidence of anything seen or heard by this agent was offered at the trial.

Moreover, what is supposed to be illegal about the conduct of this agent in the next room? It is conceded that

no electronic surveillance was in any way involved. What can be heard by the naked ear is not protected by the Fourth Amendment, *United States* v. *Llanes,* 398 F.2d 880 (2d Cir. 1968), cert. denied 393 U.S. 1032 (1969). The Supreme Court had already noted that "The risk of being overheard by an eavesdropper • • • is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Hoffa* v. *United States,* 385 U.S. 293, 303 (1966), quoting with approval from Justice Brennan's dissent in *Lopez* v. *United States,* 373 U.S. 427, 465 (1963). We would suppose that the same rule applied to what can be seen by the naked eye, even through a keyhole.

C

The Search at 608-82nd Street, North Bergen, N.J.

We find the affidavit supporting the warrant to search these premises, and the evidence adduced at the trial, made a more than sufficient showing of probable cause. The mere fact that no money or narcotics were found is of no moment. The claim of insufficiency is just as frivolous as the one made in connection with the search of Orsini's Room 6J at the Hotel Alrae.

IV

The False Statements by Orsini in his brief Interrogation before His Arraignment Were Properly Received

The arrests took place at about 2:20 A.M. of Sunday, September 19. There was a brief questioning at Narcotics Headquarters after the *Miranda* warnings had been given. Neither then nor at any time was Orsini subjected to any prolonged interrogation, nor was he asked any other than the most perfunctory questions. But, as these events oc-

curred early in the morning of a Sunday, when no Commissioner was available, and the following Monday was a Jewish Holiday and the office of the United States Attorney was understaffed, Orsini was not brought down to the Courthouse until about 1:30 P.M., although a Commissioner was in attendance from 10:00 A.M. on. There was a brief interrogation by an Assistant United States Attorney prior to arraignment. What this amounted to, with the assistance of a French interpreter, was the submission to Orsini of a series of written questions. He was told to answer the ones he wished to answer and not to answer the others. This was after the *Miranda* warnings had been repeated to him. The answers he gave were false in that he gave a false name, denied he had been in an automobile with other people on the preceding Saturday night, and he denied he had ever been in the Abbey Victoria Hotel. The trial judge overruled the objection to these admissions on the ground that they were clearly voluntary and that the *Miranda* warnings had been properly given.

We are now asked to hold that the answers should have been excluded and the judgment of conviction against Orsini reversed, not because the statements were not voluntarily made but solely because the lapse of time between the early morning of Sunday when the arrest was made and the arraignment before the Commissioner in the mid afternoon of Monday was more than 6 hours in excess of the time required for transportation. We agree with the holding of this Court in the similar case of *United States* v. *Marrero,* 450 F.2d 373 (2d Cir. 1971) to the effect that no violation of the principles of *McNabb* v. *United States,* 318 U.S. 332 (1943) and *Mallory* v. *United States,* 354 U.S. 449 (1957) is shown, nor any failure to comply with the requirements of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Section 3501. We also refuse to accept the invitation by Orsini's counsel to

reexamine the holding of this Court in *Marrero* or to hold 18 U.S.C., Section 3501 unconstitutional.

The writer of this opinion also wishes to state that he disagrees with the suggestion or intimation or whatever it may be called, in Chief Judge Friendly's concurring opinion in *Marrero* at page 379 that there is something improper, after overnight custody, in the traditional custom of a "detour" for brief questioning in the office of the United States Attorney, as a person who has been arrested is being taken before a magistrate for arraignment.

V

The Bizarre Motion for a Severance and for a Mistrial on Behalf of Ortega

After both sides had rested and the summations were about to begin, a new lawyer appeared on Ortega's behalf and made a motion "for a mistrial as to Mr. Ortega and for a severance of his case from the trial of Mr. Orsini." This turn of events is supposed to have been caused by a desire on the part of Orsini "to exculpate" Ortega, "but he is not prepared to do it before the jury that will decide the question of his (Orsini's) guilt or innocence." No credible explanation of how Orsini is to do this exculpating is proffered. The trial judge denied the motion, but with leave to renew it on written papers after the jury had rendered its verdict. So, the motion was renewed later on written papers and we are asked to give serious consideration to Orsini's generous proposal that if his case is or had been severed, he would have taken the witness stand and his exoneration of Ortega would be so convincing and persuasive that Ortega would be acquitted. Just what explanations Orsini was prepared to give for all the things he and Ortega had done together in furtherance of the conspiracy is left to conjecture. This is reminiscent

of the statement by Orsini's counsel during the trial that if the government informer was produced Orsini might recognize him as the man who solicited him to come from abroad but had concealed from him the fact that heroin was involved, and that Orsini would testify to this as a witness in his own defense. Of course, Orsini did not testify to this or anything else.

We are solemnly told that Ortega was going to call upon Orsini as his witness in defense but failed to do so as he anticipated that Orsini would assert his Fifth Amendment privilege. We are also solemnly told that "Orsini forthrightly stated that Luis Ortega and George Perez had absolutely no knowledge that the Jaguar contained heroin."

We hold that there is no merit in this extraordinary and tardy maneuver. The trial judge properly denied the motion, and this ruling furnishes no basis for a reversal of any of the judgments appealed from.

VI

There Was No Impropriety on the Part of the Prosecutor in Making Reference During His Summation to the Dates in the Passport Carried by Orsini

There was testimony by Gunther that Orsini had told him he had visited the United States on other occasions on similar illicit business. This is to some extent corroborated by other testimony. The brief and incidental reference in the prosecutor's summation to the dates in the passport was of no consequence. The passport had been received in evidence without objection and without limitation. The jury could if they chose examine any and all of the entries in the passport. However, in the light of the evidence taken as a whole, it is highly improbable that

the jury took any interest in the passport or in Orsini's other trips to the United States, except perhaps to take note of the fact that Orsini was using a passport issued to someone else, that he was masquerading under this other person's name, and that he or some other person at his request had done an especially clever piece of forgery by substituting Orsini's photograph for the photograph of the real Jean Pierre Andre Huguen.

The prosecutor denied that he had orally agreed to make reference in his summation to the entries in the passport. As held by the trial judge, it would have been a simple matter for counsel to insert this limitation in the written stipulation. The passport was received in evidence for all purposes; and the trial judge properly held that it must be presumed "that the stipulation embodies the full and complete agreement of counsel." It would have been error to grant counsel's request to instruct the jury that the passport was no proof of prior trips by Orsini to this country.

We cannot conclude this opinion without a word of comment on the wholly admirable way in which the prosecution of this complicated and difficult case was conducted by Assistant United States Attorney John M. Walker, Jr.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1098

LUIZ GOMEZ ORTEGA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1103

JEAN ORSINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1972. Mr. Justice Marshall extended the time for filing petitions for writs of certiorari to

February 9, 1973. On February 8, 1973 (No. 72-1098) and February 9, 1973 (No. 72-1103) the petitions were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly held that the government was not required to divulge the identity and whereabouts of an informant.

2. Whether search of a car, hotel room and apartment violated petitioners' Fourth Amendment rights.

3. Whether the prosecutor failed to keep an alleged agreement with defense counsel.

4. Whether the district court properly admitted a false exculpatory statement made by petitioner Orsini after his arrest.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners and one Perez were convicted as charged on two counts of having conspired to import, distribute, and to possess heroin with intent to distribute it and having distributed and possessed with intent to distribute heroin in violation of 21 U.S.C. 846 and 841 (b)(1)(A). Petitioner Ortega was sentenced to ten years' imprisonment on Count One and fifteen years' imprisonment on Count Two, the sentences to run consecutively, and was fined $35,000. Petitioner Orsini was sentenced to fifteen years' imprisonment on Count One and ten years' imprisonment on Count Two, the

sentences to run consecutively, and was fined $35,000. The court of appeals affirmed (Pet. App. A).[1]

The facts in this case have been detailed in the comprehensive opinion below (Pet. App. A2–13). Briefly, evidence at trial revealed that the relevant events commenced with a series of meetings in France in August and September 1971, wherein one Etienne Mosca, a Frenchman, persuaded co-defendant Gunther,[2] also a Frenchman, to go to New York and bring back a large quantity of currency which he was to smuggle into France and deliver to Mosca (Tr. 54, 58–63, 65–72, 74–77). Mosca gave Gunther elaborate instructions about meeting two men in New York, the first of whom, a blond, thirty-five year old man, would give Gunther a claim ticket for a parked car on September 16, 1971 (Tr. 66–67). Unknown to both Mosca and Gunther, this contact man, whom Gunther had never seen before, was also serving as an informant for the Bureau of Narcotics and Dangerous Drugs (Tr. 158, 166–167). After receiving the claim ticket from the blond man, Gunther was to meet the second man, subsequently identified as petitioner Orsini, on two occasions. At the first meeting on September 17, 1971, Gunther was instructed to hand Orsini the claim ticket and arrange a subequent meeting, no later than September 19, at which Orsini would

[1] "Pet. App. A" refers to the appendix of Orsini's petition.

[2] Gunther pleaded guilty to one of the counts in the indictment and testified as a government witness at petitioners' trial.

give Gunther the currency he was to deliver to Mosca at Orly Airport, Paris (Tr. 68–72). In addition to instructing Gunther in minute detail about these forthcoming meetings and supplying Gunther with expense money and the necessary equipment, Mosca also demonstrated for Gunther the correct procedure for hiding the currency in the false bottom of one of the suitcases Mosca provided (Tr. 71, 75–77).

Meanwhile, in England, the informant (hereinafter referred to by his code name "Festus") on August 3, 1971, purchased a Jaguar sports car (Govt. Exhibit 5, S. Tr. 339–340, 349; Tr. 278, 511, 927).[3] An agent of the Bureau of Narcotics and Dangerous Drugs saw Festus buy the Jaguar but the government neither instructed Festus to purchase the car nor furnished money for him to do so (Tr. 927). On September 10, 1971, the Jaguar, with 93½ kilos of heroin concealed in it,[4] was shipped under Festus' name aboard the Queen Elizabeth, which arrived in New York on September 15, 1971 (Tr. 266–268). Upon its arrival in New York, the Jaguar was inspected in the hold of the Queen Elizabeth by customs officers, who had been

[3] "S. Tr." refers to the transcript of the suppression hearing. "Tr." refers to the trial transcript. A copy of the entire transcript has been lodged with the Clerk of this Court.

[4] Petitioner Ortega's contention (Ortega Pet. 4) that Festus "loaded [the Jaguar] with 93[½] kilograms of heroin" is unsupported by the record. On the contrary, the government's representations in accord with *Brady* v. *Maryland*, 373 U.S. 83, and the court's *in camera* inspection of information about Festus' role in that heroin transaction establish that Festus did not purchase the heroin or load it into the Jaguar (Tr. 295, 316, 404, 415, 461).

alerted by BNDD agents. One of the 180 bags of heroin was removed and subsequently examined (Tr. 258–261; 267–270, 274). After Festus drove the Jaguar from the pier, the car was under continuous surveillance by BNDD agents. Late in the evening of September 15, 1971, BNDD agents, with the knowledge and consent of Festus, dismantled the Jaguar and removed 179 bags of heroin, which they replaced with identical bags of lactose except for one bag of heroin they initialed and left in the car. The agents then reassembled the Jaguar (S. Tr. 339; Tr. 374–378, 496–505).

On the following days, Gunther, pursuant to his instructions from Mosca, obtained the parking claim ticket from Festus, passed the ticket to petitioner Orsini and arranged to meet again with Orsini to obtain the currency from him (Tr. 84–87, 94–102). Orsini, after receiving the claim ticket from Gunther, contacted petitioner Ortega and co-defendant Perez.[5] At 12:20 a.m. on September 19, 1971, Ortega presented the claim ticket at the garage where the Jaguar was parked. He drove the Jaguar from the garage, followed immediately by Orsini and Perez in a separate car. A few blocks from the garage the Jaguar stalled. Petitioners and Perez were arrested as they tried to restart the car (Tr. 597–599, 612–622, 776–784). Among the items seized from Orsini were a diagram of the Jaguar which pinpointed the location of the 180 bags of heroin, and various instructions in

[5] The meetings between Orsini, Ortega and Perez are described in the opinion below (Pet. App. A7–12).

French as to how to remove the heroin from the car and how to recognize Gunther (Govt. Exhibits 25–27, Tr. 799–802, 807–812).

Later in the day search warrants were executed for Orsini's hotel room and Perez' apartment. At the apartment, agents found and seized a 25 pound scale (Tr. 344–347, 390–392). At 1:50 p.m. the following day, Monday, September 20, 1971, Orsini was interviewed by an Assistant United States Attorney prior to his arraignment at 4:00 p.m. Orsini claimed his name was Huguen and denied riding in a car the evening of his arrest (Tr. 828–829, 835–837, 842–846).

ARGUMENT

1. Petitioners contend that the government's refusal to disclose Festus' true identity and whereabouts deprived them of information which might have helped them establish an entrapment defense. Petitioner Orsini contends that, although he had been a willing participant in a venture which he knew to be illegal (Pet. 25), the disclosure of the informant could have helped him establish the traditional entrapment defense because "his trip to the United States was triggered by a meeting with a man who fit the general description available of the informer" (Pet. 10).[6] This claim, which was made by Orsini's counsel and never verified under oath by petitioner who put in no defense or affidavit in support of his claim, does not even approach the showing necessary to establish

[6] Orsini's counsel admitted at trial that the man with whom petitioner met did not quite fit the description of the informant, since he did not have the same hair color (Tr. 210–211).

an entrapment defense either under the traditional standards, set out in *Sorrells* v. *United States,* 287 U.S. 435, and *Sherman* v. *United States,* 356 U.S. 369, or under the "new entrapment defense" suggested by some recent lower court decisions, and relied upon by both petitioners (Orsini Pet. 9–18; Ortega Pet. 7–14). The court of appeals properly rejected these claims.

A. THE TRADITIONAL DEFENSE

Under the traditional entrapment defense, it is not enough that an informer or undercover agent aided the defendant in the commission of the crime; rather it must be shown that he 'implant[ed] in the mind of an innocent person the disposition to commit the alleged offense." *Sorrells* v. *United States,* 287 U.S. 435, 442; *Sherman* v. *United States,* 356 U.S. 369. Petitioner Orsini offered to show only that he met "with someone [possibly the informant] prior to coming to this country and it was from that someone that he received [the] instructions" (Tr. 288) which he followed when he arrived in the United States. But even if the informant was that "someone," there is no basis in the offer of proof for the claim that Orsini, who admits that he knowingly entered upon illicit activity (Pet. 25), was an "innocent person" in whose mind had been planted the disposition to commit the offense.[7] Moreover, as the court of appeals observed, "it

[7] Petitioner Ortega claimed that the informant would testify that he (Ortega) and a co-defendant Perez, "were unknown to the importer-informant" (Ortega Pet. 9). Clearly in these circumstances there is not the slightest basis for the traditional or the "new" entrapment defense. See *e.g.*, *United States* v. *Sanchez*, 440

is clear beyond peradventure of doubt, as demonstrated by what each of these appellants did to effectuate the purposes of the conspiracy, as outlined in our statement of the evidence, that each of these appellants was ready, willing and able and had a prior propensity to engage in a heroin importation and distribution venture" (Orsini Pet. App. A15).

B. THE "NEW ENTRAPMENT DEFENSE"

Petitioners, relying principally upon *United States* v. *Russell*, 459 F. 2d 671 (C.A. 9), certiorari granted, 409 U.S. 911, argued February 27, 1973, also claim that the presence of the informant would have helped them establish a defense based solely on the activity of the informant—regardless of their obvious criminal propensity. But as the court of appeals here found, *Russell* and similar cases, whether correctly decided or not, only stand for the limited proposition that where the government "provides not only the occasion for committing the offense but also the contraband necessary for its consummation [there may] be entrapment as a matter of law, irrespective of the propensity of the accused to commit the crime" (Orsini Pet. App. 15).

Here the informant did no more than act as a "conduit" in transferring the heroin from its illicit source to petitioner. Such conduct by government

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F. 2d 649 (C.A. 9); *United States* v. *Jenkins*, 470 F. 2d 1061, 1063 (C.A. 9), certiorari denied, April 2, 1973 (No. 72-995). Moreover, since it was never alleged that the informant knew Ortega or Perez it is difficult to determine how the presence of the informant would have aided their defense.

agents has repeatedly been recognized as a proper investigatory tactic. See *e.g., Chapman* v. *United States*, 443 F. 2d 917 (C.A. 10); *United States* v. *Beckley*, 335 F. 2d 86 (C.A. 6), certiorari denied *sub nom. Stone* v. *United States*, 380 U.S. 922; *United States* v. *Davis*, 272 F. 2d 149 (C.A. 7); *United States* v. *Solmen*, 298 F. Supp. 51 (E.D.N.Y.).

Since it was stipulated that the informant purchased the Jaguar, although not with government funds, and that the informant transported the heroin ladened vehicle into the United States with the knowledge and acquiesence of the government (Tr. 927), and since the district court determined that the heroin was not supplied by the government,[8] it is plain that the availability of the informant could not have added anything further that could have possibly aided petitioners' "defense." The district court thus properly refused, after an *in camera* hearing, to endanger his

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[8] The district court conducted an *in camera* proceeding with the consent of petitioners to determine whether the conduct of the informant came within the ambit of the "new entrapment" cases. After examining materials provided by the United States Attorney, the district court stated (Tr. 415–416):

"THE COURT. I have explored this matter explicitly from materials in the possession of the government and have satisfied myself that the Bueno situation [*United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5)] is not the situation which we face here.

Just so you might be perfectly clear, I mean that I have inquired into the question of the informant's involvement in terms of any dealing with the heroin or any loading of the heroin into the vehicle and all of those various points which you have raised."

Following these findings, there were no further motions to disclose the informant's identity (Pet. App. A18).

life by requiring the divulgence of his whereabouts or insisting on his presence at trial.[9]

We direct the attention of the Court, however, to the recent *per curiam* opinion of the Court of Appeals for the Ninth Circuit in *United States* v. *Knight*, C.A. 9, No. 72–2031, decided October 16, 1972, pending on the government's petition for certiorari (No. 72–965), which seems to go beyond *Russell*, and suggests that in the Ninth Circuit's view some activity falling short of actually supplying contraband may suffice to give rise to the "new entrapment defense." There, as here, an informant acted as a conduit in a "controlled" delivery of heroin to the defendant from an illegal source. The Ninth Circuit summarily affirmed the suppression of evidence, citing *Russell* and several similar cases, but without discussion. The petition for certiorari filed by the United States cited an apparent conflict between the holding in *Knight* and the holding in the instant case as a basis for granting the petition for review (Pet. 10–13).

We adhere to the view that this case was correctly decided by the court of appeals, and that the decision below is in accord with the well-settled law. Indeed, in *United States* v. *Jenkins*, 470 F. 2d 1061 (C.A. 9), certiorari denied, April 2, 1973 (No. 72–995), the Ninth Circuit without citing its earlier decision in *Knight* held that the "new entrapment defense" which it had

[9] This case illustrates the danger of revealing the identity and whereabouts of informants, since the Jencks Act statements of the principal witness, Gunther (proferred to the defense in accord with 18 U.S.C. 3500) reveals that petitioners threatened Gunther or his family with death if he cooperated with the government (Tr. 243–252).

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created in *Russell* was inapplicable unless it is shown that the defendants were "induced" by the informant to commit the offense (470 F. 2d at 1063). There is no claim here that either petitioner was anything but a willing participant in an international heroin smuggling ring.[10] The Court may, however, wish to defer action on the petitions here, pending the disposition of the petition in *Knight*.

2. Petitioners also contend that the search of the Jaguar, of Orsini's hotel room, and of Perez' apartment violated their Fourth Amendment rights, that the prosecutor failed to keep an alleged agreement made with defense counsel, and that Orsini's exculpatory statement two hours before arraignment was obtained in violation of *McNabb-Mallory*. These contentions were thoroughly considered and properly rejected by the court below (Pet. App. A19–A27), upon whose opinion we rely.[11]

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[10] Moreover, we note that petitioners' activities were sufficient to justify their conviction on the conspiracy count (Count I), even under the new entrapment defense upon which they rely, regardless of the effect that the subsequent activities of the informant might have on the substantive count here (Count II). See *United States* v. *McGrath*, 468 F. 2d 1027, 1031 (C.A. 7), petition for certiorari pending (No. 72–761); *United States* v. *Chisum*, 312 F. Supp. 1307, 1312 (C.D. Calif.); cf. *United States* v. *Basey*, 468 F. 2d 194, 195–196 (C.A. 9), petition for certiorari pending (No. 72–786). But since petitioners received consecutive sentences on both counts, this is not a case where the concurrent sentence doctrine would be appropriate.

[11] We would only add that petitioner Orsini's reliance on *United States* v. *Case*, 435 F. 2d 766 (C.A. 7), in support of his claim that "a person is entitled to reasonable expectations of privacy within his hotel room * * * [from] *non-electronic* eaves-

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CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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dropping, from corridors or adjoining rooms" (Pet. 27, emphasis added), fails to note that the Seventh Circuit has limited *Case* to its facts, and held that it applied only where the law enforcement officers listened to conversation while stationed "in a place where they had no right to be" (*United States* v. *Hanahan*, 422 F. 2d 649, 653 (C.A. 7)). Here, of course, the law enforcement officers had a legal right to be in the adjoining hotel room which they rented.

U.S. GOVERNMENT PRINTING OFFICE: 1973